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No. 02-617

In the Supreme Court of the United States

CHANEY L. PHILLIPS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under the Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, §§ 201-211, 110 Stat. 1227-1241, the United States may use the remedies provided by the Federal Debt Collection Procedures Act of 1990, 28 U.S.C. 3001 *et seq.*, to enforce a victim restitution order that was entered as part of the criminal judgment in a federal prosecution.

2. Whether the retroactive application of provisions of the Mandatory Victims Restitution Act of 1996, which alter the procedural mechanisms for enforcing restitution orders but do not affect a defendant's substantive liability for restitution, violate the Ex Post Facto Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 303 F.3d 548. The opinion of the district court is unreported and is omitted from petitioner's appendix, but is reproduced at App., *infra*, 1a-2a. The order of the district court certifying its judgment for appeal under Federal Rule of Civil Procedure 54(b) (Pet. App. 7-8) is also unreported.

JURISDICTION

The court of appeals entered its judgment on July 22, 2002. The petition for a writ of certiorari was filed on October 18, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Louisiana, petitioner was convicted of six counts of mail fraud, in violation of 18 U.S.C. 1341, one count of engaging in an illegal monetary transaction, in violation of 18 U.S.C. 1957, and conspiracy to commit each of those crimes. See *United States* v. *Phillips*, 219 F.3d 404 (5th Cir. 2000). In addition to imposing a term of incarceration, the district court ordered petitioner to pay victim restitution in the amount of $217,587.56. Pursuant to the restitution order, the United States sought a writ of garnishment against petitioner's interest in an estate and against his retirement account. The district court denied petitioner's motion to discharge the garnishment. The court of appeals affirmed.

1. The Mandatory Victims Restitution Act of 1996 (Restitution Act), Pub. L. No. 104-132, §§ 201-211, 110 Stat. 1227-1241, made victim restitution a mandatory component of the sentence for many federal crimes and provided for enhanced post-conviction enforcement of such orders by the federal government. 18 U.S.C. 3663A, 3664. Before the Restitution Act, restitution orders in federal criminal sentences could be enforced by either the crime victim or the United States. 18 U.S.C. 3663(h) (1994). The Restitution Act strengthened enforcement by providing that the Attorney General "shall be responsible for collection of an unpaid fine or restitution," including victim restitution, 18 U.S.C. 3612(c), and directing the Attorney General to promulgate guidelines to ensure that restitution orders are enforced "to the fullest extent of the law," 18 U.S.C. 3551 note. The Restitution Act further provides that the entry of a restitution order as part of a criminal

judgment vests in the United States a property right in the defendant's assets, such that "an order of restitution * * * is a lien in favor of the United States" on all of the defendant's property and rights to property. 18 U.S.C. 3613(c). In addition, the Restitution Act requires defendants to make their restitution payments to the court, rather than to the victim. 18 U.S.C. 3611.

The Restitution Act empowers the Attorney General to enforce victim restitution orders in the same manner that it collects fines, under 18 U.S.C. 3571-3574 and 3611-3614, and "by all other available and reasonable means," 18 U.S.C. 3664(m)(1)(A)(ii). See also 18 U.S.C. 3613(f) ("all provisions of this section [pertaining to the enforcement of fines] are available to the United States for the enforcement of an order of restitution"). Accordingly, under the Restitution Act, the Attorney General may enforce a restitution order "in accordance with the practices and procedures for the enforcement of a civil judgment under Federal law or State law." 18 U.S.C. 3613(a) (made applicable to restitution orders by 18 U.S.C. 3664(m)(1)(A)). The practices and procedures for enforcement of a civil judgment under federal law, in turn, are set forth, *inter alia*, in the Federal Debt Collection Procedures Act of 1990 (Collection Act), 28 U.S.C. 3001 *et seq.* Those procedures include the use of garnishment. 28 U.S.C. 3205.

2. Following entry of his felony convictions, petitioner was ordered to pay victim restitution to the Sun Life Assurance Company, the St. Helena Parish Assessor's Office, and the Louisiana Assessors Insurance Fund in the amount of $217,587.56. In February 1999, the United States sought writs of garnishment, pursuant to the Collection Act, against petitioner's interest in an estate and his retirement account. Pet. App. 2. Petitioner did not request a hearing, and the

district court entered a garnishment order against petitioner's retirement account. The district court denied petitioner's subsequent motion to discharge the garnishment order, App., *infra*, 1a-2a, on the ground that the Restitution Act granted the United States the authority to use the garnishment procedures of the Collection Act to enforce victim restitution orders, *id.* at 2a.

3. Petitioner's initial appeal was dismissed for lack of a final judgment. Pet. App. 3. Following the district court's certification of its judgment for appeal under Federal Rule of Civil Procedure 54(b), petitioner again appealed, and the court of appeals affirmed. Pet. App. 1-6. The court of appeals rejected petitioner's argument that the United States could not use the Collection Act to enforce a victim restitution order. The court found it "clear that the plain language of the [Restitution Act] authorized the Government to garnish accounts for victim restitution to be paid to private parties." *Id.* at 5. The court found further support for its conclusion in the legislative history, concluding that "the statutory language and legislative history persuade[] us beyond peradventure * * * that Congress drafted the [Restitution Act] with the intent that it would allow prosecutors to utilize the [Collection Act] to collect restitution in favor of private victims." *Id.* at 6.

The court of appeals also rejected petitioner's argument that application of the Restitution Act's procedural mechanisms for the enforcement of restitution orders to crimes committed before the Restitution Act's effective date violates the Ex Post Facto Clause. The court explained that the Restitution Act affects only how petitioner's sentence is procedurally enforced;

it does not increase petitioner's punishment. Pet. App. 6.

ARGUMENT

1. Petitioner contends (Pet. 4-8) that the court of appeals' holding that the United States may use the procedures of the Collection Act to enforce victim restitution orders is incorrect and conflicts with decisions of the First Circuit. Petitioner is wrong on both counts.

First, the plain language of the Restitution Act permits the use of Collection Act procedures to enforce victim restitution orders. As the court of appeals explained (Pet. App. 5), the Restitution Act expressly empowers the Attorney General to enforce victim restitution orders in the same manner that he recovers criminal fines or by any means available under federal and state law to enforce a civil judgment. 18 U.S.C. 3664(m)(1)(A); see also 18 U.S.C. 3613(f). The principal means for collection of fines and enforcement of other civil judgments by the United States are the procedures established by the Collection Act, 28 U.S.C. 3001 *et seq.*, which the Restitution Act expressly incorporates, 18 U.S.C. 3664(m)(1)(A). Petitioner's arguments (Pet. 5) that victim restitution orders are not "debts" "owed to the United States," within the meaning of the Collection Act, thus cannot be reconciled with Congress's expansion of the Collection Act's scope through the Restitution Act.

Second, the First Circuit's decisions in *United States* v. *Bongiorno*, 106 F.3d 1027 (1997), and *United States* v. *Rostoff*, 164 F.3d 63 (1999), are not to the contrary. *Bongiorno* involved the enforcement of a child support order under the Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106 Stat. 3403, not a restitution order under the Restitution Act. 106 F.3d at 1035-1040.

Furthermore, the *Bongiorno* court had no occasion to address the Restitution Act and its expansion of the scope of the Collection Act because the conviction in *Bongiorno* occurred before the Restitution Act's effective date. *Id.* at 1029-1030; see also Pet. App. 4 n.3 (noting that the *Bongiorno* court "did not discuss the [Restitution Act] at all").

In addition, *United States* v. *Rostoff*, *supra*, has no relevance to this case. In that case, the First Circuit held only that a restitution order in favor of the Federal Deposit Insurance Corporation is a "debt[] owed *to the United States*" under the Collection Act. 164 F.3d at 69.

2. Petitioner's argument (Pet. 8-11) that application of the Restitution Act's enforcement provisions violates the Ex Post Facto Clause, U.S. Const., Art. I, § 9, Cl. 3, does not merit further review. Congress applied the Restitution Act to all cases in which convictions are obtained on or after April 24, 1996, the effective date of the Act. See Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, § 211, 110 Stat. 1241 (The Act "shall, to the extent constitutionally permissible, be effective for sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment."). Petitioner was convicted on August 3, 1998, rendering the Restitution Act applicable to his sentencing.

Although the Restitution Act applies retroactively to petitioner's case, it does not implicate the Ex Post Facto Clause. With respect to criminal punishments, the Ex Post Facto Clause proscribes only laws that "change[] the punishment [for a criminal act], and inflict[] a greater punishment, than the law annexed to the crime, when committed." *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (Chase, J.) (emphasis omitted). As

the court of appeals explained (Pet. App. 6), application of the Restitution Act's enhanced procedures for enforcement of the restitution order do not implicate those limitations. The Restitution Act's enforcement provisions did not alter petitioner's liability for restitution or enhance the amount imposed. They simply ensure that the sentence imposed will be more effectively enforced. Enhancements in the government's ability to carry out a criminal sentence—whether in the form of improved locks on jail cells or improved collection procedures for monetary assessments—do not fall within the prohibitions of the Ex Post Facto Clause. See *California Dep't of Corrs.* v. *Morales*, 514 U.S. 499, 507-508 (1995) (alteration in the procedures to be followed in fixing a parole release date, without a change in the substantive standards for obtaining parole, does not violate the Ex Post Facto Clause).

For that reason, petitioner's claim of a circuit conflict (Pet. 9-10) is unavailing. Each of the cases petitioner cites concerns the retroactive application of different provisions of the Restitution Act that substantively altered defendants' liability for restitution; not one of them found that allowing enforcement of restitution orders under the Collection Act violated the Ex Post Facto Clause.* Indeed, in *United States* v. *Baggett*, 125

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* See *United States* v. *Richards*, 204 F.3d 177, 213 (5th Cir.) (provision requiring the court to set restitution at the full amount of victim loss, regardless of defendant's ability to pay, violates the Ex Post Facto Clause when applied to crimes committed before the Restitution Act's effective date), cert. denied, 531 U.S. 826 (2000); *United States* v. *Edwards*, 162 F.3d 87, 89-92 (3d Cir. 1998) (shift from discretionary to mandatory restitution retroactively increases punishment, in violation of the Ex Post Facto Clause); *United States* v. *Siegel*, 153 F.3d 1256, 1260 (11th Cir. 1998) (same); *United States* v. *Rezaq*, 134 F.3d 1121, 1140-1141 & n.13 (D.C. Cir.)

F.3d 1319 (9th Cir. 1997), the Ninth Circuit expressly distinguished substantive alterations in restitution liability, which were subject to the Ex Post Facto Clause's limitations, from procedural changes in the imposition of restitution orders, which were not. *Id.* at 1323. Far from demonstrating an inter-circuit conflict, *Baggett* thus supports the court of appeals' decision in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2003

(same), cert. denied, 525 U.S. 834 (1998); *United States* v. *Williams*, 128 F.3d 1239, 1241 (8th Cir. 1997) (same) (dicta); *United States* v. *Baggett*, 125 F.3d 1319, 1322-1323 (9th Cir. 1997) (same); *United States* v. *Thompson*, 113 F.3d 13, 15 & n.1 (2d Cir. 1997) (same).

APPENDIX

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF LOUISIANA

Civil Action No. 99-91-D

IN THE MATTER OF THE SUCCESSION OF
STANLEY E. HORNSBY

CONSOLIDATED FOR GARNISHMENT
PROCEEDINGS WITH

Criminal Action No. 99-91-B

UNITED STATES OF AMERICA

v.

CHANEY L. PHILLIPS

[Filed: June 29, 2000]

RULING ON MOTION TO DISCHARGE GARNISHMENT

This matter is before the court on a motion by defendant, Chaney L. Phillips, to discharge garnishment. The government has filed an opposition; defendant has filed a reply brief; and the government has filed a supplemental opposition. There is no need for oral argument.[†]

[†] To the extent that defendant requests a hearing on the matter, the court agrees with the government that such request is un-

On October 20, 1999, defendant filed a motion "to discharge garnishment" on the grounds that the government lacks the authority to enforce a criminal restitution order by using the collection remedies set forth in the Federal Debt Collection Procedures Act ("FDCPA"), 28 U.S.C. §§ 3001-3308. Defendant cites case law to the effect that the government may not use the FDCPA to collect a debt owed to a private entity. There is no dispute that the restitution owed by defendant is payable to private victims.

In opposition, the government persuasively argues that the FDCPA should be read in conjunction with the Mandatory Victims Restitution Act of 1996 ("MVRA"). Consequently, the cases cited by defendant, which do not discuss the MVRA, are inapposite. For the reasons stated by the government in its briefs, the court finds that the motion to discharge garnishment lacks merit.

Accordingly, the motion by defendant (doc. 58) to discharge garnishment is hereby DENIED.

Baton Rouge, Louisiana, June 29, 2000.

/s/ JAMES J. BRADY
JAMES J. BRADY, JUDGE
MIDDLE DISTRICT OF LOUISIANA

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timely. Moveover, the sole issue is one of law, which the court readily disposes with herein.